United States Circuit Court of Appeals

For the Ninth Circuit

No. 10237

THE TEXAS COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF.

ALBERT E. VAN DUSEN,
135 East 42nd Street,
New York, N. Y.,

J. A. McNAIR,
929 So. Broadway,
Los Angeles, California,

Attorneys for Petitioner,
The Texas Company.

FILED
FEB - 1 1943
PAUL P. O'BRIEN,
CLERK

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Reply to Point I.

A. As to the alleged interference, restraint and coercion in violation of Section 8(1) of the Act.

The Board endeavors to sustain its findings and conclusion that petitioner interfered with, restrained, and coerced its employees on its vessel, the *S.S. California,* by contending that certain utterances and statements made by two mates on such vessel constituted "oral coercion" (Board's Brief, p. 7).

It should be noted, and the Board does not dispute the fact, that these alleged statements and utterances were confined to the *S.S. California* and that although the Board's complaint charged that petitioner had discharged two seamen, namely, J. Gordon Rosen and James Blasingame, from such vessel for union activities, the Board itself, after a hearing, held that Rosen and Blasingame were not discharged for union activities from that vessel (R. 100). The only issue, therefore, is whether the statements *in themselves* constituted an unfair labor practice within the meaning of Section 8(1) of the Act, since no finding was made by

the Board that petitioner had in any other way interfered with, restrained or coerced its employees in so far as the *S.S. California* is concerned.

In support of its argument that the statements alone interfered with, restrained, and coerced employees of petitioner in the exercise of their rights, the Board cites a number of decisions by the United States Supreme Court and by this Court, but an examination of such decisions discloses that in no one of such decisions was it held that anti-union statements *in themselves* constituted restraint or coercion in violation of the National Labor Relations Act. In fact, in every one of those cases it was plainly evident that the respondents by their very action and conduct had carried out and put into effect the statements charged to them. In the case of *National Labor Relations Board* v. *Schaefer-Hitchcock Co.,* decided by this Court November 12, 1942, it is apparent that the two supervisors charged with making anti-union utterances were found to have actually sponsored a company meeting of employees to discuss whether the employees should join a union. One of such supervisors made a speech at a meeting discouraging the formation of a new union. There was no evidence of instructions by officials of the company on union policy. Here the company was held not only to have dominated the so-called company union but also to have discharged a number of employees for engaging in union activities. In addition to the anti-union statements, the Court found actual intimidation and coercion.

In the cases of *National Labor Relations Board* v. *Fruehauf Trailer Co.,* 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58, and *National Labor Relations Board* v. *Link-Belt Company,* 311 U. S. 584, it is quite evident that whatever anti-union statements were made were not in themselves considered a violation of the Act, but only when coupled with conduct

resulting in the discharge of employees for union activities. In fact, in the *Link-Belt Company* case the United States Supreme Court said (at p. 598):

> "* * * The employer's attitude towards an 'outside' union *coupled with* the discharge of Salmons and Novak for activities on behalf of Amalgamated would tend to have as potent an effect as direct statements to the employees that they could not afford to risk selection of Amalgamated."

In the cases of *National Labor Relations Board* v. *Hearst,* 102 F. (2d) 658, and *National Labor Relations Board* v. *Sunshine Mining Company,* 110 F. (2d) 780, both decided by this Court, it is likewise clear that anti-union remarks alone were not considered sufficient by the Court to justify a finding of the existence of an unfair labor practice. In the *Sunshine* case the company's foreman formed an unlawful group of so-called "Vigilantes" who drove the organizers of the union out of the region, had posted a notice on the bulletin board stating that the company would only bargain with groups to the extent of their membership, and the general manager of the plant had stated that he would not sign an agreement with the union. The company here was found to have refused to bargain and to have discharged certain union leaders.

The Board also relies on the case of *National Labor Relations Board* v. *Virginia Electric and Power Company,* 314 U. S. 469, but an examination of the Supreme Court's opinion in that case discloses that the Court very definitely held that anti-union statements *alone* do not constitute a violation of the Act. On this point, the Court said (at p. 477):

> "* * * Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made.

> The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, *in connection with other circumstances,* to coercion within the meaning of the Act." (Italics ours.)

And also, at page 479:

> "It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. *If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone."* (Italics ours.)

As pointed out in petitioner's main brief, it should be borne in mind that although the original complaint charged petitioner with engaging in unfair labor practices in respect to twelve seamen, all of these charges have since been dismissed except the charge pertaining to one seaman, namely, Rosen, which is now before this Court, and that as to the *S.S. California,* the Board itself found that the two employees who were alleged to have been discharged for union activities, namely J. Gordon Rosen and James Blasingame, were not so discharged. There is, therefore, no evidence in the record that the statements, if made, resulted in any interference, restraint, or coercion in violation of rights guaranteed by the Act. *Press Co., Inc.* v. *National Labor Relations Board,* 118 F. (2d) 937 (C. C. A., Dist. of Columbia).

The Board intimates, however, that even if Rosen was not discharged for union activities from the *S.S. California,* nevertheless the statements above referred to led to his subsequent discharge from petitioner's vessel, the *S.S.*

Nevada, on April 19, 1938 (Board's Brief, p. 9). Since Rosen left the *S.S. California* in September, 1937, it is difficult to believe that statements made by officers on that vessel motivated officers on an entirely different vessel, the *S.S. Nevada,* in discharging him for union activities from such vessel *seven months later.* To a reasonable mind it would seem that if the statements had any bearing at all on Rosen's discharge the Board would have found that the officers who made the statements discharged him. Yet, the Board did not so find! In any event, the burden of proof in showing that hostility toward a union resulted in an unfair labor practice clearly rests on the Board. *Interlaken Iron Corp.* v. *National Labor Relations Board,* 131 F. (2d) 129, 133 (C. C. A 7th).

The Board also contends that the persons charged with making the alleged anti-union statements, namely Mates Baldwin and David Rosen, occupied such positions aboard the *S.S. California* that petitioner cannot avoid responsibility for their statements. Even assuming this to be the case, which petitioner disputes, the authorities cited by Board's counsel are clearly inapplicable, since it is quite evident from an examination of the record that petitioner not only never approved or was aware of the statements alleged to have been made but, in fact, had instructed the officers on its vessels not to discriminate between its employees because of union activities or affiliations. (See Petitioner's Brief, pp. 31-36.) Since, as petitioner contends, the record wholly fails to show that the utterances of Mates Baldwin and Rosen, if made, were approved by or reflect the policy of petitioner, or that such utterances actually resulted in the slightest interference, restraint, or coercion in violation of the Act, the Board has improperly found petitioner responsible for such utterances. *E. I. DuPont De Nemours & Co.* v. *National Labor Relations Board,* 116 F. (2d) 388 (C. C. A. 4th).

B. As to the alleged discriminatory discharge of Rosen.

In attempting to show that Rosen was discharged from the *S.S. Nevada* for union activities and not for laziness and neglect of duty, the Board relies primarily on (1) Rosen's testimony that he was an active union leader, (2) Rosen's experience at sea and (3) the testimony of Herman and Hart (Board's Brief, pp. 9-13).

As to whether Rosen's activities as a union leader were a reason for his discharge, no better answer need be given than his own admission that other seamen were just as active as he, namely, Lee Holmes and Sidney Cole (R. 228, 235). Rosen's testimony in this connection was corroborated by his fellow seaman, Clarence Buckless (R. 783-785), who added seamen Lee Arnold and Jensen and who also testified that these other active union men were not discharged (R. 784-785). All of these seamen, except Buckless, remained aboard petitioner's vessels. As to Buckless, the Board found he had not been discharged for union activities from the *S.S. Washington* and this Court found he was properly discharged for drunkenness from the *S.S. Nevada. The Texas Company* v. *National Labor Relations Board,* 120 F. (2d) 186.

In its brief, the Board contends that these employees were not of "comparable stature" to Rosen (Board's Brief, pp. 20-22). This conclusion is not only contrary to Rosen's own testimony, but is rather amazing, particularly in so far as Buckless is concerned, in view of the Board's statement in the brief which it filed in the first case before this Court that Rosen and Buckless were "the outstanding Union leaders on the ships in which they sailed" and that no other seamen were of "comparable stature". (See Board's Brief in Case No. 9518, p. 15.)

In this connection it is most significant that although the Board's complaint charged that both Rosen and Buckless had been discharged for union activities at the same time and from the same vessels (*S.S. Nevada* and *S.S. Washington*) nevertheless the Board itself found as pointed out above, that Buckless had been discharged for drunkenness from the *S.S. Washington,* and this Court held he had been properly discharged for the same reason from the *S.S. Nevada* (R. 108, 111). *Under these circumstances it is difficult to understand how the Board can in good faith assert that the testimony of petitioner's officers was not entitled to credence in the case of Rosen's discharge from the S.S.Washington when it found the same officers acted justifiably in the case of Buckless.* (See Board's Brief, p. 19; R. 1770.)

As for Rosen's experience at sea, the record shows that over a period of ten years he was employed by more than ten different companies (R. 373) and that he shifted from one company and ship to another at will (R. 373-374). Although he hesitated to commit himself, he admitted that he had probably been fired from other ships (R. 403, 404). Certainly, this does not justify the Board's characterization of Rosen's record at sea as "highly creditable" (Board's Brief, p. 14).

The testimony of Hart and Herman has already been adverted to by petitioner in its principal brief and need not be discussed further here (Brief for Petitioner, p. 14).

* * * * * * * * * *

Even if this Court should hold that Rosen was discharged from the *S.S. Nevada* for union activities the record is devoid of substantial evidence to support the Board's conclusion that Rosen was similarly discharged three months later (July 14, 1938) from the *S.S. Washington.*

In its brief the Board points to no evidence as to the reasons for Rosen's discharge from that vessel other than Rosen's own uncorroborated testimony (Board's Brief, pp. 16-20). In other words, the only evidence in the record is Rosen's own assertions that he was an active union leader and that on a number of occasions he, along with others, presented grievances to Captain Bergman (Board's Brief, pp. 16-20).

In this connection it should be observed that practically all of Rosen's testimony, on which the Trial Examiner and the Board relied, consisted of notes made by him of conversations he himself had with others and conversations between others which he overheard, and which he read into evidence (R. 270-303; 379). Petitioner moved to strike such evidence from the record on the ground Rosen's notes were hearsay and should only have been used to refresh the witness' recollection (R. 16, 58). The Trial Examiner denied such motion (R. 16) and was sustained by the Board (R. 86, 87).

Although the Board is given a good deal of discretion in applying the generally accepted rules of evidence, this Court has condemned the practice of accepting hearsay evidence without any requirement of actual corroboration. *National Labor Relations Board* v. *Union Pacific Stages,* 99 F. (2d) 153, 176 (C. C. A. 9th). Here, the testimony was uncorroborated and clearly prejudicial. Such evidence was, therefore, incompetent and should not be used as a basis to support findings of the Board. *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 98 F. (2d) 870 (C. C. A. 5th).

As opposed, on the other hand, to Rosen's uncorroborated testimony, a large part of which, as shown above, was hearsay and otherwise incompetent, is the testimony of Captain Bergman and Chief Mate Johanneson of the *S.S. Washington* that Rosen was lazy and inattentive to his duties (Brief for Petitioner, pp. 16-19).

Corroborative of this testimony was the vessel's crew list, in which Captain Bergman had noted that Rosen had been discharged for "incompetency" (Brief for Petitioner, p. 18). Despite its own reliance on mere notes of conversations made by an interested party, the Board seeks to minimize the weight to be attached to the entry in the crew list, calling it a self-serving declaration (Board's Brief, pp. 18, 19). The keeping of a crew list is a regular part of a Master's duties on every voyage, and it is even required by statute on foreign voyages that the crew list be filed with the Collector of Customs (46 U. S. C. A. 677). An entry made on such a list as this, therefore, is clearly an entry made in the regular course of business and entitled to weight as such.

In attempting to answer petitioner's argument that Rosen was discharged for laziness and neglect of duty, counsel to the Board, as pointed out above, referred to Rosen's ten years of experience as a seaman (Board's Brief, p. 10). It is submitted that this fact is irrelevant and immaterial. It is not contended that Rosen was incompetent, but that he was deliberately inattentive to his duties. Obviously, experience at sea is no proof of the fact that he was not or could not have been lax in his duties. In fact, this Court indicated that such might have been the fact when it considered this case the first time. *The Texas Company* v. *National Labor Relations Board,* 120 F. (2d) 186, 190.

C. As to the Board's contention that neither "general questions of safety at sea nor the body of maritime safety legislation subtracts from the validity of the Board's findings".

In support of its conclusion that despite the body of Congressional maritime legislation referred to by this Court in its previous opinion in this case, the Board had properly

concluded that Rosen was discharged for union activities, the Board's counsel argue that there was nothing in Rosen's activities inconsistent with the performance of his duties as a seaman or in anywise violative of law (Board's Brief, p. 23). We think an adequate answer to this contention is the previous opinion of this Court condemning Rosen for proceeding "to agitate among the seamen" and his conduct in using the structure of the vessel itself to display on its side a large C. I. O. banner as she came into port, even though the officers of the ship had disapproved. (See 120 F. (2d) 186.)

Clearly, if Rosen was engaged in such conduct, *which he himself admits,* could he have been or was he attentive to his duties? Moreover, does not such fact lend credence to the testimony of the two officers of petitioner on the *S.S. Nevada* and the two officers of petitioner on the *S.S. Washington,* that he was neglectful of his duties and was discharged for such reason?

Further, the Board argues that there is "no suggestion in the record that these normal and proper activities interfered with Rosen's work, endangered the safety of ships' cargoes, or were detrimental to maintenance of discipline on board these ships, within the meaning of Congressional maritime safety legislation" (Board's Brief, p. 24). It seems to us that the Board has misapprehended the purpose and scope of the maritime safety statutes. It was not necessary for Rosen to stir up a mutiny or a riot on board ship in order to endanger the safety of the vessel or interfere with ship's discipline. If he neglected his duty in any respect or if he disregarded the commands of his superior officers, as is charged and proved here, there was justification for the conclusion that discipline was interfered with or the safety

of the vessel endangered. In fact, he may even have violated the Federal statute making it a crime by "intimidation" to "usurp the command of a vessel from its officers" (18 U. S. C. A. 484), or the statute providing for punishment of a crew member for "continued willful disobedience or neglect of duty at sea" (46 U. S. C. A. 701, Articles Fifth and Sixth).

This is obviously what this Court had in mind in its first opinion in this case (120 F. (2d) 186), and which, more recently, the United States Supreme Court spoke of in its opinion in the case of *Southern Steamship Company* v. *National Labor Relations Board,* 62 S. Ct. 886.

Moreover, it should be borne in mind that the Nation is now at war and that discipline and attention to duty are more important than in normal times. If the Board's order is sustained and Rosen is to be reinstated despite the testimony of the officers of petitioner's vessels as to his neglect of duty, and particularly in the light of his own admission that he ignored his superior's commands respecting the display of the C. I. O. banner, the masters of petitioner's vessels can hardly be expected to maintain discipline aboard ship or be responsible for the safety of vessel, cargo and crew.

It is submitted that this case is clearly distinguishable from the ordinary case, and that, as pointed out by the Circuit Court of Appeals for the Fifth Circuit in *Peninsular and Occidental Steamship Company* v. *National Labor Relations Board,* 98 F. (2d) 411 (cert. den. 305 U. S. 653), great weight is to be given a master's testimony and he should not be held bound to retain under his supervision seamen whom he considers unfit or unsatisfactory in view of the responsibilities imposed upon him by federal statutes.

Reply to Point II.

A. As to the blanket cease and desist provisions of the order.

The Board offers no answer to petitioner's contention that paragraphs "a" and "b", and particularly "b", of the Board's order are improper in the light of *National Labor Relations Board* v. *Express Publishing Company,* 312 U. S. 426, except to assert that similar provisions in Board orders have been enforced by this Court and by the United States Supreme Court. An examination, however, of the authorities cited by the Board does not disclose that the point in question was raised in those cases. It is entirely possible that the records in such cases will show that blanket "cease and desist" provisions were included in the Board's orders. Assuming that to be so, it is quite obvious that unless the respondents in those cases raised the point, it cannot be said that the Courts have approved such provisions in the light of the *Express Publishing Company* case.

Petitioner insists that any cease and desist provision of a Board order which provides, as in this case, that petitioner shall cease and desist from "*in any other manner* interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, etc." is clearly disapproved by the Supreme Court's opinion in the *Express Publishing Company* case for lack of specificity. (See Petitioner's Brief, pp. 38-40.)

B. As to the provision of the Board's order requiring posting and maintenance of appropriate notices on all of petitioner's docks and vessels.

The authorities cited by the Board do not deal with the specific question of where and in what manner cease and desist notices should be posted. It is, of course, possible that the records in those cases will reflect that a broad post-

ing order was made. However, in the absence of any controversy over that issue, the authorities cited by the Board do not sustain its contention that the Board's order in this case is proper.

As contended in petitioner's main brief, the alleged violations of the National Labor Relations Act in this case occurred on three vessels, namely, the *S.S. California,* the *S.S. Nevada,* and the *S.S. Washington.* There is no charge that any violation of law was committed on any of the numerous other vessels of petitioner. In fact, many of these vessels were in distant ports when the alleged acts of violation occurred. Certainly, therefore, the determination of the existence of unfair labor practices on one vessel does not warrant an order for the posting of cease and desist notices on any other vessel.

Conclusion.

The Board's petition for enforcement should be denied and the Board's decision and order herein should be set aside as prayed for herein and in petitioner's original brief.

Respectfully submitted,

Albert E. Van Dusen,
135 East 42nd Street,
New York, N. Y.,

J. A. McNair,
929 So. Broadway,
Los Angeles, California,

Attorneys for Petitioner,
The Texas Company.

January 26, 1943.